

REMARKS

This Application has been carefully reviewed in light of the Office Action mailed December 21, 2005 (the "Office Action"). Applicants amend Claims 2, 6, 12, 16, 22 and 26. Applicants respectfully request reconsideration and favorable action in this case in view of the following remarks.

Section 112 Rejections

The Office Action rejects Claims 2-3, 6, 9, 10, 12-13, 16, 19, 20, 22-23, 26 and 29-30 under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Applicants have amended Claims 2, 12 and 22 to clarify that the "either dropping or playing" step in those claims is based on the comparison and a fullness of the buffer. In addition, Applicants have amended Claims 6, 16 and 26 to overcome the rejections of those claims. Applicants respectfully submit that Claims 2-3, 6, 9, 10, 12-13, 16, 19, 20, 22-23, 26 and 29-30 are in compliance with 35 U.S.C. § 112.

Section 103 Rejections

The Office Action rejects Claims 1-2, 4-5, 10-12, 14-15, 20-22, 24-25 and 30 under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 6, 580,694 B1 issued to Baker ("*Baker*"). The Office Action rejects Claims 3, 13 and 23 under 35 U.S.C. § 103(a) as being unpatentable over *Baker* in view of U.S. Patent No. 6,658,027 issued to Kramer ("*Kramer*"). The Office Action rejects Claims 6, 16 and 26 under 35 U.S.C. § 103(a) as being unpatentable over *Baker* in view of U.S. Patent No. 6,249,757 issued to Cason ("*Cason*"). Applicants respectfully traverse these rejections.

Claim 1 recites "receiving a time-sensitive packet of a data stream," "comparing an energy level of a payload signal of the packet to an energy level of a payload signal of a previous packet" and "either dropping or playing the packet based on the comparison." Claims 11 and 21 recite similar elements. The Office Action states that *Baker* "does not disclose the feature of either dropping or playing the packet based on the comparison" but that *Baker* "does teach a conventional playback mechanism (col. 3, lines 8-11) for dropping or playing packet based on the detection of signal or silence (col. 4, line 64 to col. 5, line 9)."

Office Action, page 3, ¶ 5. However, *Baker* does not disclose dropping or playing a packet based on a detection of signal or silence. The portion of *Baker* cited by the Office Action for this disclosure merely discloses increasing a size of packet queue to introduce greater latency. *See Baker*, col. 4, line 65 – col. 5, line 9. There is no disclosure of dropping or playing a packet based on the detection of signal or silence, as the Office Action suggests.

The Office Action additionally states that either dropping or playing the packet based on a comparison of an energy level of a payload signal of the packet to an energy level of a payload signal of a previous packet "would have been obvious" since "it is well known in the art to detect the signal or silence based on the comparison of energy level of payloads between current packet and previous packet." Office Action, page 3, ¶ 5. Essentially the Office Action is thus stating that using modifying *Baker* to include this element would have been obvious because the element is well known in the art. However, the Office Action cites to nothing in the art as disclosing or obviating this element. To the extent that any rejection is based on "Official Notice," "well-known art," common knowledge or other information within the Examiner's personal knowledge, Applicants respectfully request that the Examiner cite a reference in support of his position or provide an affidavit in accordance with M.P.E.P. § 2144.03 and 37 C.F.R. § 1.104.

Moreover, the Office Action fails to cite to any portion of any art as providing the motivation to make the proposed modification. According to the Federal Circuit, "a showing of a suggestion, teaching, or motivation . . . is an 'essential component of an obviousness holding.'" *Brown & Williamson Tobacco Corp. v. Philip Morris Inc.*, 229 F.3d 1120, 1124-25, 56 U.S.P.Q.2d 1456, 1459 (Fed. Cir. 2000) (quoting *C.R. Bard, Inc., v. M3 Systems, Inc.*, 157 F.3d 1340, 1352, 48 U.S.P.Q.2d 1225, 1232 (Fed. Cir. 1998). Furthermore, while "evidence of a suggestion, teaching, or motivation . . . may flow from the prior art references themselves, the knowledge of one of ordinary skill in the art, or, in some cases, the nature of the problem to be solved, . . . [t]he range of sources available . . . does not diminish the requirement for actual evidence." *In re Dembiczak*, 175 F.3d 994, 999, 50 U.S.P.Q.2d 1614, 1617 (Fed. Cir. 1999). Thus, it is a factual question that cannot be resolved on subjective belief and unknown authority, but must be based on objective evidence of record. *See In re Lee*, 277 F.3d 1338, 1343-44, 61 U.S.P.Q.2d 1430, 1434 (Fed. Cir. 2002). Indeed, the factual

inquiry whether to combine or modify references must be thorough and searching. *McGinley v. Franklin Sports, Inc.*, 262 F.3d 1339, 1351-52, 60 U.S.P.Q.2d 1001, 1008 (Fed. Cir. 2001).

Because *Baker* fails to even disclose dropping or playing packets based on anything, much less the detection of silence or signal as the Office Action suggests, and because there is no cited motivation to modify *Baker* as the Office Action suggests, Applicants respectfully submit that Claims 1, 11 and 21 are patentable over the cited art used in the rejections.

Claims 2-6, 10, 12-16, 20-26 and 30 each depends, either directly or indirectly, from one of Claims 1, 11 and 21. Therefore, Applicants respectfully contend that each of Claims 2-6, 10, 12-16, 20-26 and 30 are each patentably distinguishable from the cited art used in the rejections for at least the same reasons discussed above with regard to their respective base claims.

Moreover, Claims 2 recites "either dropping or playing the packet based on the comparison and a fullness of the buffer." Claims 12 and 30 recite similar elements. The Office Action suggests that *Baker* discloses this element at col. 4, lines 1-10. *See* Office Action, page 4. However, this cited portion of *Baker* merely discloses latency and the storing and playing of packets in a packet queue. There is no disclosure of dropping or playing the packet based on a fullness of a buffer. For at least these additional reasons, Claims 2, 12 and 30 are patentable over the cited art used in the rejections.


CONCLUSION

Applicants have made an earnest attempt to place this case in condition for allowance. For the foregoing reasons, and for other apparent reasons, Applicants respectfully request full allowance of all pending Claims. If the Examiner feels that a telephone conference or an interview would advance prosecution of this Application in any manner, the undersigned attorney for Applicants stands ready to conduct such a conference at the convenience of the Examiner.

Applicants believe no fee is due. However, should there be a fee discrepancy, the Commissioner is hereby authorized to charge any fees or credit any overpayments to Deposit Account No. **02-0384** of **Baker Botts L.L.P.**

Respectfully submitted,

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